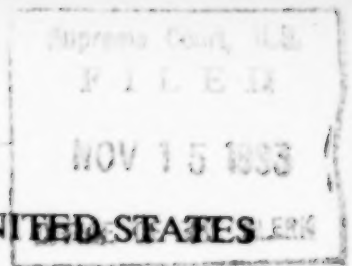


No. 92-1911

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1993



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PUD NO. 1 OF JEFFERSON COUNTY AND  
THE CITY OF TACOMA,

*Petitioners,*

v.

STATE OF WASHINGTON, DEPARTMENT OF  
ECOLOGY, DEPARTMENT OF FISHERIES  
AND DEPARTMENT OF WILDLIFE,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF WASHINGTON

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BRIEF OF PACIFIC NORTHWEST UTILITIES,  
AMICI CURIAE, IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

	Page
Interest of Amici Curiae .....	1
Summary of Argument .....	1
Argument .....	3
I. Unless the Washington Supreme Court's Decision Is Reversed, the Effects of Its Erroneous Interpretation of the Clean Water Act Will Be Felt Throughout the Pacific Northwest .....	3
II. The White River Project: Another Example of the Problem .....	7
A. The Project .....	8
B. The FERC Licensing Proceeding ...	9
C. Instream Flows Adopted by Puget Power and the Muckleshoot Indian Tribe ...	10
D. FERC's Section 10(j) Proceedings ..	12
1. Alternative Flow Proposals Submitted to FERC .....	12
2. FERC Staff Rejected the Agencies' Proposal as Inconsistent with Federal Law .....	15
3. FERC's Attempt To Resolve the Inconsistency .....	17
4. WDOE Unilaterally Imposed the Flows FERC Staff Had Rejected .....	19
III. The Importance of FERC's Paramount Authority to the Operation of the Pacific Northwest Coordinated Hydroelectric System .....	20
A. The Wells Dam Example .....	25
B. The Priest Rapids Dam Example ...	27
Conclusion .....	30
Attachment A The Pacific Northwest Utilities Joining in This Brief as Amici Curiae .....	A-1

## TABLE OF AUTHORITIES

Cases Cited	Page
<i>Dept. of Game v. Puyallup Tribe</i> , 414 U.S. 44 (1973) .....	11
<i>Lucas v. South Carolina Coastal Council</i> , 112 S. Ct. 2886 (1992) .....	6
<i>Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation v. Puget Sound Power &amp; Light Co.</i> , No. 472-72C2(V) (W.D. Wash.) .....	10
<i>National Wildlife Federation v. F.E.R.C.</i> , 801 F.2d 1505 (9th Cir. 1986) .....	24
<i>Puget Sound Power &amp; Light Co. v. Federal Energy Regulatory Comm.</i> , 644 F.2d 785 (9th Cir.), cert. denied, 454 U.S. 1053 (1981) .....	9
<i>Puget Sound Power &amp; Light Co. v. Riveland</i> , (No. C93-5267B; W.D. Wash.) .....	20
<i>Puyallup Tribe v. Washington Dept. of Game &amp; State of Washington</i> , 433 U.S. 165 (1977) .....	11
<i>State of Washington, Dept. of Ecology v. PUD No. 1</i> , 121 Wn.2d 179, 849 P.2d 646 (1993) .....	6
<i>United States v. Washington</i> , 759 F.2d 1353 (9th Cir.), cert denied, 474 U.S. 994 (1985) .....	11
<i>United States v. Washington</i> , 384 F. Supp. 312 (W.D. Wash. 1974) aff'd 520 F.2d 767 (9th Cir.), cert denied, 423 U.S. 1086 (1976) .....	10,11
<i>U.S. Dept. of Interior v. FERC</i> , 852 F.2d 538 (D.C.Cir. 1992) .....	5

Administrative Decisions	Page
<i>Carex Hydro</i> , 52 FERC ¶ 61,216 (1990) .....	4
<i>Central Maine Power Co.</i> , 52 FERC ¶ 61,033 (1990) .....	5
<i>Rock Creek Limited Partnership</i> , 38 FERC ¶ 61,240 (1987) .....	6
<i>Town of Summersville</i> , 60 FERC ¶ 61,291 (1992) reh'g denied 63 FERC ¶ 61,037 (1993) .....	4
Statutes	
Clean Water Act	
Section 102(b)(2), 33 U.S.C. § 1252(b)(2) .....	27
Section 102(b)(6), 33 U.S.C. § 1252(b)(6) .....	27
Section 301(a), 33 U.S.C. § 1311(a) .....	3
Section 401, 33 U.S.C. § 1341 .....	3,7,8
Section 401(a), 33 U.S.C. § 1341(a) .....	3
Section 401(d), 33 U.S.C. § 1341(d) .....	4
Federal Power Act, as amended by Electric Consumers Protection Act of 1986, Pub. L. No. 99-495	
Section 4(e), 16 U.S.C. § 797(e) .....	6,14,16
Section 10(a), 16 U.S.C. § 803(a) .....	6,14,16
Section 10(j), 16 U.S.C. § 803(j) .....	6,7,13,15,17,19,20
Section 10(j)(1), 16 U.S.C. § 803(j)(1) .....	5,12
Section 10(j)(2), 16 U.S.C. § 803(j)(2) .....	5,17,19
Administrative Rules	
W.A.C. 173-201-045(1) .....	4
W.A.C. 173-201-045(1)(a) .....	4
W.A.C. 173-201-080(32) .....	4

## Other Authorities

Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962 . . . . .	25
FERC Project No. 2494	
White River Project, Additional Instream Supplemental Application for License, including Flow Studies and Flow Recommendations for the Project Reach of the White River (August 1987) . . . . .	9,12,13
White River Project, Response to Agency Proposals Regarding Instream Flow (March 1990) . . . . .	14,15
Environmental Assessment for Hydropower License, White River Hydroelectric Project, FERC Project No. 2494-002 (October 9, 1992) .	15,16
FERC staff summary of Section 10(j) meeting (enclosure to FERC letter of February 17, 1993) . . . . .	17,19
Order, 64 FERC ¶ 61,045 (1993) . . . . .	19
Revised Order, 65 FERC ¶ 61,050 (1993) . . . . .	19
H.R. Conf Rep. No. 934, 99th Cong., 2d Sess. (1986) . . . . .	6
"Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244 . . . . .	21

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**BRIEF OF PACIFIC NORTHWEST UTILITIES,  
AMICI CURIAE, IN SUPPORT OF PETITIONERS**

**INTEREST OF AMICI CURIAE**

Much of the electrical generating capability in the Pacific Northwest is hydroelectric. This brief is filed, with consent of the parties, on behalf of ten Pacific Northwest utilities, individually described in Attachment A. Some of these utilities are publicly owned and some are investor owned. Some are located in the State of Washington and some are located elsewhere. These amicus parties own and operate many of the largest nonfederal projects in the Pacific Northwest.

For many purposes, these utilities are competitors. They share, however, a united interest in and concern about the critical need to maintain the long-standing coordinated planning and operation of the Pacific Northwest's regional hydroelectric system. As explained below, it is imperative that these utilities operate their separate projects in coordination with one



another. That coordinated operation will be much more difficult, if not impossible, if this Court allows each individual state to determine unilaterally the minimum streamflows for every hydroelectric facility within its borders.

### SUMMARY OF ARGUMENT

Unless it is reversed, the Washington Supreme Court's decision will create an unworkable system of dual authority over hydroelectric project licensing. That court's erroneous reading of the Clean Water Act allows state fish and wildlife agencies to interfere with a licensing process that Congress intended to be administered at the federal level, not by the states. As an immediate result of this erroneous decision, state agencies have already unilaterally imposed, in another Pacific Northwest licensing proceeding, minimum flow requirements that FERC's staff had previously concluded were inconsistent with the standards of the Federal Power Act.

The consequences of this kind of disruption will not be limited to individual hydroelectric projects. In the Pacific Northwest, what happens to an individual project affects all of a highly-coordinated regional hydroelectric system. That coordinated system's need for the consideration and accommodation of many diverse interests in a single authoritative forum has been well served for many years by FERC's exercise of its paramount authority over conditions of hydroelectric project licenses. Unless the Washington Supreme Court's erroneous reading of the Clean Water Act is reversed, there will be serious damage to a system which has long been working as Congress intended.

### ARGUMENT

#### **I. Unless the Washington Supreme Court's Decision Is Reversed, the Effects of Its Erroneous Interpretation of the Clean Water Act Will Be Felt Throughout the Pacific Northwest.**

The coordinated Pacific Northwest hydroelectric system, and its operation under FERC's administration, are described below at pages 20-30. Unless the decision below is reversed, it will seriously disrupt that system.

The Washington Supreme Court's decision may well have rendered an entire hydroelectric project economically infeasible (Petition for Certiorari pp. 9, 15). That court mistakenly believed that the agency rulings it was reviewing were authorized (indeed, required) by § 401 of the Clean Water Act. The record is clear, however, that the minimum flows set by the Washington Department of Ecology ("WDOE") and approved on judicial review by the Washington Supreme Court are not necessary to maintain water quality in the Dosewallips River and are beyond WDOE's authority to impose.

The Clean Water Act regulates the discharge of pollutants. 33 U.S.C. § 1311(a). Section 401(a) of the Act requires state certification only for federal licenses or permits "which may result in any discharge." 33 U.S.C. § 1341(a)(1). Operation of the Elkhorn project would not cause the discharge of any pollutants into the Dosewallips River. Water would simply be removed from the river and then returned, unchanged, at a downstream location.

WDOE conceded that its mandated flows "are in excess of those required to maintain water quality in the bypass region" (Petition for Certiorari App. 83a). WDOE thereby acknowledged that those flows are not necessary to assure that water quality in the project reach will "markedly and uniformly exceed the requirements for all or substantially all uses" including fish and wildlife habitat.<sup>1</sup> Nevertheless, the Washington Supreme Court erroneously approved the imposition of WDOE's minimum flows, reasoning that they were necessary to assure that the project applicants would comply with "other appropriate requirement[s] of state law" within the meaning of § 401(d) of the Clean Water Act.

That decision creates an unnecessary and unintended conflict between two federal statutes. The State of Washington's role under the Clean Water Act is simply to protect water quality by regulating the potential discharge of pollutants as defined in that Act. FERC does not administer the Clean Water Act, and has concluded that it has no authority to determine whether or not conditions imposed by a state that has invoked the provisions of § 401(d) of that Act are authorized under that statute. *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied 63 FERC ¶ 61,037 (1993); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-71 (1990);

<sup>1</sup>This is one of the water quality standards specified in W.A.C. 173-201-045(1)(a) for Washington's Class AA (extraordinary) waters, W.A.C. 173-201-080(32), including the Dosewallips River. W.A.C. 173-201-045(1) also sets specific standards for identifiable pollutants in such waters.

*Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990). *Accord U.S. Dept. of Interior v. FERC*, 852 F.2d 538 (D.C.Cir. 1992). However, it is FERC's responsibility, not that of the states, to condition hydroelectric project licenses to protect fish habitat and spawning grounds.

The Federal Power Act ("FPA"), as recently amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, grants FERC paramount authority over the matters involved here. Under Section 10(j) of the FPA, each hydroelectric project license issued by FERC "shall include conditions for . . . protection, mitigation, and enhancement" of fish and wildlife, "including related spawning grounds and habitat." 16 U.S.C. § 803(j)(1). Those conditions "shall be based on recommendations" from state fish and wildlife agencies, among other sources. *Id.* FERC must either adopt the recommendations of state fish and wildlife agencies or publish findings explaining how their adoption would be inconsistent with the FPA or other applicable law. FERC must also find that any different conditions FERC does impose on the license satisfies the FPA's requirements for fish and wildlife protection and enhancement. 16 U.S.C. § 803(j)(2).

This procedure was adopted by Congress despite express requests by the states for independent authority to set mandatory minimum streamflows for hydroelectric



projects in order to protect fisheries.<sup>2</sup> In Sections 4(e) 10(a), and 10(j) of the FPA, 16 U.S.C. §§ 797(e) and 803(a), (j), Congress charged FERC, not the states, with paramount authority to provide for the protection, mitigation of damage to, and enhancement of fish, specifically including their spawning grounds and habitat. If WDOE had submitted its streamflows to FERC as § 10(j) recommendations, they would have received the consideration Congress intended.<sup>3</sup> However, instead of submitting its recommendations for FERC's consideration and evaluation under that provision, WDOE included them in its § 401 certification, thereby circumventing the balancing process which Congress directed FERC to perform under § 10(j).

The Washington Supreme Court erroneously approved WDOE's maneuver. The decision below gave Washington's fish and wildlife agencies, through WDOE,

<sup>2</sup>See *Rock Creek Limited Partnership*, 38 F.E.R.C. ¶ 61,240, n.8 (1987); H.R. Conf Rep. No. 934, 99th Cong., 2d Sess. 23-25 (1986).

<sup>3</sup>Despite evidence that the WDOE minimum flows were designed to enhance or maximize fish habitat (PCHB No. 86-118, TP, Day 3, pp. 3-6, 27-29; Petition for Certiorari, App. 54a-57a), the Washington Supreme Court concluded that they were properly characterized as designed for "preservation" only. *State of Washington, Dept. of Ecology v. PUD No. 1*, 121 Wn.2d 179, 199, 849 P.2d 646, 657 (1993) (Petition for Certiorari, App. 27a). This dispute over proper characterization demonstrates that in fisheries management, as in other areas of environmental regulation, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). What flows are appropriate conditions of a federal license for fishery preservation or enhancement is a question for FERC to resolve under § 10(j), not an issue that a state may unilaterally determine in a water quality certificate.

an effective veto power over the construction of the Elkhorn project. That court's mandate issued on April 21, 1993 (Petition for Certiorari, App. 1a), and its effects manifested themselves immediately. One week later, on April 29, 1993, WDOE asserted its newly-approved unilateral authority on another Pacific Northwest hydroelectric project: Puget Sound Power & Light Company's White River Project. In the White River Project WDOE completely short-circuited FERC's painstaking § 10(j) process, rendering useless nearly a decade of work by FERC, Puget Power, and federal and state agencies.

## II. The White River Project: Another Example of the Problem

In the case of the White River Project, WDOE has included in the § 401 certification minimum instream flows that do not address water quality, that far exceed flows necessary to preserve fish habitat, and that will result in staggering costs. Proceeding under § 10(j) of the FPA, FERC staff made a preliminary determination that those same flows were inconsistent with federal law. FERC staff found that the WDOE flows would cost approximately \$3,100,000 each year in lost power production as compared to alternative flows that FERC staff had developed. FERC staff specifically found that, despite the profound impact on power production, WDOE's flows would provide little or no additional potential benefit for the White River fishery. In the face

of that finding, WDOE imposed those flows in the § 401 water quality certification.

#### A. The Project

Puget Power is the largest investor-owned electric utility in the State of Washington, serving over 800,000 customers. This public utility services the electrical needs of residential, farm, commercial and industrial customers in Western Washington.

The White River Project, FERC No. 2494, was constructed in 1910-11, before the enactment of the FPA. Like Tacoma's proposed Elkhorn Project, the White River Project diverts water from a river, runs that water through a series of facilities to and through turbine generators, and then returns the water to the river downstream from the diversion.<sup>4</sup>

After Congress amended the FPA in the 1960s, the Federal Power Commission (FERC's predecessor) obtained jurisdiction over all projects constructed on navigable waterways prior to the FPA's enactment. The White River was determined to be "navigable" for

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<sup>4</sup>The White River Project, however, differs from the Elkhorn Project in a number of ways. For example, (i) the White River is a river separate from the Dosewallips with a wholly different environment, (ii) the White River Project is already built and has existed for 83 years, (iii) the project has a storage reservoir (Lake Tapps), and (iv) Puget Power has existing water rights, storage rights and other rights pertaining to the White River and the Project. The Lake Tapps reservoir is subject to the Pacific Northwest Coordination Agreement.

purposes of the FPA,<sup>5</sup> and Puget Power filed an application with FERC to license the project.

#### B. The FERC Licensing Proceeding

That license application has been pending since 1983. Over the last ten years, the appropriate instream flow between the point of water diversion and the point at which the diverted water is returned to the river (the "project reach" or "bypass region") has been the subject of extensive study and continuous, contentious dispute.

Since 1911, the Project has operated according to the judicially determined minimum instream flow requirements of Puget Power's water rights<sup>6</sup> for the project -- 30 cubic feet/second ("cfs") -- a flow found sufficient for the White River by expert reviews made contemporaneous with the Project's original construction. This minimum flow was chosen because it would leave unimpaired any fishery interest in the White River.<sup>7</sup>

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<sup>5</sup>See *Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm.*, 644 F.2d 785 (9th Cir.), cert. denied, 454 U.S. 1053 (1981).

<sup>6</sup>Puget Power's vested water rights derive from claims dated April 17, 1895, and April 27, 1901, from the decree of the Superior Court of the State of Washington for Pierce County, *Pacific Coast Power Co. v. Quilquillion* (Decree No. 28120, dated April 13, 1910) (specifying the amount of Puget Power's water right, including the 30 cfs minimum flow), as well as from property acquired by Puget Power along the reach.

<sup>7</sup>White River Project, Additional Instream Supplemental Application for License, including Flow Studies and Flow Recommendations for the Project Reach of the White River (August 1987), on file with FERC in Project No. 2494 (hereafter "Flow Study and Recommendations"), at 8-9, 99.



In 1985, FERC staff directed Puget Power to perform an instream flow study for the project reach using the same Instream Flow Incremental Methodology ("IFIM") used in the Elkhorn Project. Puget Power conducted the IFIM study in consultation with all interested state and federal fisheries agencies<sup>8</sup> and the Muckleshoot Indian Tribe (which has treaty fishing rights in the White River).<sup>9</sup>

**C. Instream Flows Adopted by Puget Power and the Muckleshoot Indian Tribe**

At the same time that the instream flow issues were being addressed in the licensing proceeding, Puget Power and the Muckleshoot Tribe were involved in separate litigation in federal district court on fishery issues involving the proper instream flow for the project reach.<sup>10</sup> The Muckleshoot Tribe's reservation straddles the project reach and the Tribe has a right to take up to 50% of the harvestable fish that pass through its usual and

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<sup>8</sup>These included National Marine Fisheries Service ("NMFS"), the United States Fish and Wildlife Service ("USFWS"), and the Washington Departments of Fisheries and Game (now Wildlife) ("WDF" and "WDW").

<sup>9</sup>The Muckleshoot Tribe's treaty fishing rights were confirmed in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 767 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976).

<sup>10</sup>*Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation v. Puget Sound Power & Light Co.*, No. 472-72C2(V) (W.D. Wash.).

accustomed fishing sites.<sup>11</sup> The Muckleshoot Tribe is the main fishery user on the White River.

On October 31, 1986, with the approval of the federal district court, Puget Power and the Muckleshoot Tribe settled their lawsuit in a way that both parties believed (and continue to believe) would substantially enhance the White River fishery in a cost-effective way. They agreed that Puget Power would increase instream flows and construct a hatchery. As a consequence, the instream flows were increased by approximately 400%--from 30 cfs to 130 cfs--and certain supplementary flows were also provided.<sup>12</sup>

The Puget Power/Muckleshoot Tribe flows actually improve on nature. IFIM modeling shows that the flows that Puget Power is now providing result in more fish habitat than would have existed in the project reach with natural, unregulated flows. Also, the hatchery can produce as many fish as Puget Power and the

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<sup>11</sup>See, e.g., *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 767 (9th Cir.), *cert denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 759 F.2d 1353 (9th Cir.), *cert denied*, 474 U.S. 994 (1985); *Dept. of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Washington Dept. of Game & State of Washington*, 433 U.S. 165 (1977).

<sup>12</sup>These flows are measured at the boundary of the Muckleshoot reservation. Puget Power began releasing 130 cfs immediately on conclusion of the settlement in 1986 and has been doing so ever since. This amount of water is equivalent to approximately 84 million gallons per day. By comparison, the entire metropolitan area of the nearby city of Tacoma, with a population in excess of 400,000, uses only an average of 70-75 million gallons per day.

Muckleshoot Tribe estimate were possible for the entire White River under natural conditions.<sup>13</sup>

**D. FERC's Section 10(j) Proceedings**

**1. Alternative Flow Proposals Submitted to FERC**

For the White River licensing proceeding, FERC considered several alternative flow proposals pursuant to its duty under § 10(j) of the FPA to include license conditions

... to adequately and equitably project, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation and management of the project.

16 U.S.C. § 803(j)(1).

While conducting and implementing the settlement negotiations described above, Puget Power, in full consultation with all interested state and federal fisheries agencies, conducted the instream flow study mandated by FERC for the licensing proceeding. Puget Power submitted to FERC its Flow Study and Recommendations, proposing adoption of the Puget Power/Muckleshoot

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<sup>13</sup>Flow Study and Recommendations, *supra*, note 7, at pp. 110-11. Natural conditions restrict fish propagation in the White River. Factors in the river that adversely affect fish include its unusually high natural sediment load, channel instability, poor spawning gravel, loss of the Commencement Bay estuary, oceanic influences, and impacts on the river from forest harvest, fish harvest, agriculture, and urbanization. Flow Study and Recommendations, *supra*, note 7, at pp. 10-44.

Tribe flows and hatchery agreement as fishery enhancement conditions for the project license.

In 1987 and 1988, the federal and state fish and wildlife agencies submitted comments to FERC on Puget Power's Flow Study and Recommendations and also submitted their own joint minimum flow recommendation as contemplated by § 10(j) of the FPA. The agencies recommended much higher instream flows than those recommended by Puget Power and the Muckleshoot Tribe. Although the IFIM study results established that juvenile salmon rearing was inconsistent with such high flows, the agencies did not address this fact.<sup>14</sup>

In 1989, three of these agencies<sup>15</sup>, together with WDOE and the Puyallup Indian Tribe,<sup>16</sup> submitted new recommended minimum flows. These recommended flows were again much higher than the Puget Power/Muckleshoot flows. This time, the agencies addressed the issue of juvenile salmon flows. However, instead of relying on the IFIM study, which the agencies

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<sup>14</sup>Juvenile salmon prefer lower velocities due to limited swimming ability and stamina and metabolic constraints. Because higher velocities are usually associated with higher flows, rearing habitat for juveniles can be disrupted by flows with higher velocities. Flow Study and Recommendations, *supra*, note 7, at pp. 69-70, 88, 108-110.

<sup>15</sup>NMFS, WDF, and WDW

<sup>16</sup>The Puyallup Indian Tribe did not intervene in the FERC licensing proceedings for the White River Project until 1987. The White River is a tributary of the Puyallup River, which runs through the Puyallup Indian Tribe's reservation.



had previously acknowledged was properly conducted,<sup>17</sup> they rejected the IFIM measurements for juvenile salmon on the strength of visual observations of the river at a few locations and a few flow levels.<sup>18</sup> Relying on these visual habitat preference "estimates" in lieu of the IFIM study recommendations for juvenile salmon, the agencies developed their new flow recommendation (the "NMFS flows") which ranged from 350 to 500 cfs.

As with the Elkhorn project, the agencies' flow proposals for the White River Project did not address the balance of uses required to be considered under Sections 4(e) and 10(a) of the FPA. Those flows were designed solely to optimize fish habitat in the project reach.<sup>19</sup>

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<sup>17</sup>See, e.g., Letter from Washington Department of Fisheries to Puget Power, dated August 21, 1987. White River Project, Response to Agency Proposals Regarding Instream Flow (March 1990), on file with FERC in Project No. 2494 (hereafter "Flow Response"), Attachment 2A.

<sup>18</sup>These observations were made by individuals who had not participated in the IFIM study.

<sup>19</sup>For example, USFWS described its work as follows:

The next step was to identify those flows (using the data supplied by Puget Power) that were optimum for each species/lifestage occurring in each month. . . .

Since there were always overlapping species or lifestages during any given month, we then examined all flows that fell between the highest and lowest optimal flow level for those overlapping species. A discharge was selected that minimized the difference in optimal flows for the overlapping species/lifestages determined to be the most sensitive to flow.

Letter from Charles A. Dunn to Kenneth F. Plumb dated December 3, 1987, p. 3, Flow Response, *supra*, note 17, Attachment 2B.

The agencies did not consider other uses or the costs of the flows to Puget Power's customers.<sup>20</sup>

## 2. FERC Staff Rejected the Agencies' Proposal as Inconsistent with Federal Law

FERC staff reviewed the various competing instream flow proposals, as well as alternatives of its own, in an Environmental Assessment ("EA") issued in October 1992. FERC staff concluded:

No single alternative among the seven flow regimes we've examined would provide either the most or the least chinook habitat benefits for all four life stages -- each flow alternative is a tradeoff between the life stages . . . . The NMFS flows provide the highest values for the spawning and incubation life stages, Puget's flows provided the highest values for juveniles, and the staff #3 flows for adult holding. However, the staff #3 spawning and incubation values are within 1.3 percent of the NMFS values and cost about \$3.1 million per year less than NMFS. . . .<sup>21</sup>

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<sup>20</sup>For example, in the State of Washington Department of Fisheries' April 28, 1988 Section 10(j) comments to FERC on Puget Power's proposed flows, WDF stated:

Instream flows need to be set to protect the fisheries resource, not on [Puget Power's] analysis of whether these minimum flows will gain or cost their [sic] customers.

Page 8 of enclosure to April 28, 1988 letter from Joseph Blum to Lois Cashell, Flow Response, *supra*, note 17, Attachment 2C.

<sup>21</sup>Environmental Assessment for Hydropower License, White River Hydroelectric Project, FERC Project No. 2494-002 (October 9, 1992) at p. 69, on file with FERC in Project No. 2494.



As FERC staff found, the agencies' proposed flows would cost approximately \$3,100,000 more each year than the flows recommended by FERC staff. FERC staff determined that the agencies' recommended flows were not balanced or appropriate under federal law because they would impose an extraordinary cost with little or no correlative benefit to the fishery:

Under § 10(1) of the Act, we are making a preliminary determination that the . . . minimum flows recommended by the federal and state fish and wildlife agencies are inconsistent with the purpose and requirements of Part 1 of the Act.

As we discuss in the Comprehensive Development section, *we don't recommend adopting the minimum flows proposed by the fish agencies because the minimum flows included in our recommended alternative provide nearly comparable or greater fish habitat benefits at a much lower cost to power generation.*

Therefore, we believe the *agencies' recommendations are inconsistent with the public interest standard of section 4(e) [16 U.S.C. § 797(e)] and the comprehensive planning standard of section 10(a) [16 U.S.C. § 803(a)] of the Act.*

*Id.*, at pp. 70-71 (emphasis added).

As its recommended alternative, FERC staff proposed flows approximately halfway between the agencies' proposed flows and those proposed by Puget

Power and the Muckleshoot Tribe. FERC staff concluded that these flows would fulfill the fish protection requirements of § 10(j) while also satisfying the other purposes and requirements of federal law.

### 3. FERC's Attempt To Resolve the Inconsistency

When FERC staff determines, under § 10(j), that an agency recommendation may be inconsistent with federal law, FERC is required to "attempt to resolve any such inconsistency" with the agencies. If the inconsistency cannot be resolved, then FERC staff must make written findings regarding the inconsistency and that FERC staff's own alternative license conditions appropriately protect, mitigate damage to, or enhance fish and wildlife (including related spawning grounds and habitat). 16 U.S.C. § 803(j)(2).

FERC staff's inconsistency determination for the White River Project therefore triggered further efforts by FERC staff to resolve the inconsistency with the agencies under § 10(j)(2). FERC staff held a meeting in January 1993 with the agencies, Puget Power and other interested parties. Although some inconsistencies were resolved, the inconsistency pertaining to minimum flows was not. FERC agreed to re-examine minimum flow alternatives and further information to be provided before making a final § 10(j) decision on instream flows.<sup>22</sup> Puget Power, seeking an opportunity to demonstrate that its proposal

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<sup>22</sup>FERC staff summary of Section 10(j) meeting filed with FERC in Project No. 2494 (enclosure to FERC letter of February 17, 1993).

would better serve the public interest than either the agencies' proposed flows or FERC staff proposed flows, requested that FERC hold an evidentiary hearing on the instream flow issues.<sup>23</sup>

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<sup>23</sup>The issues are very complicated and Puget Power believed that a hearing might facilitate their clarification and resolution. More than 4,000 pages of documents have been filed with FERC addressing the various parties' contentions. Puget Power contends that the higher agency flows are not supported--and are in fact contra-indicated--by available scientific information, even setting aside the natural habitat limitations of the White River. The agencies have not demonstrated that their flows will yield more fish than Puget Power's proposed flows. Yet, by the FERC staff estimate, the agencies' higher flows would cost approximately \$6.5 million more per year than the Puget Power/Muckleshoot Tribe flows and \$3.1 million per year more than FERC staff flows in replacement power costs over the term of the 40 year license. Some of the significant issues of material fact in dispute include:

- What is a realistic projection of the increase (if any) in fish from the agency or FERC staff flows as compared to the Puget Power/Muckleshoot Tribe flows?
- How does a realistic projection of fish benefits from the agency or FERC staff flows compare to the costs of providing such flows?
- Will the hatchery built by Puget Power provide reliable and increased fish production?
- Will the combination of flows and hatchery recommended by Puget Power and the Muckleshoot Tribe provide equivalent or greater fish benefits at a lower cost than the agency or FERC staff flows?
- How will the agency, FERC staff and Puget Power/Muckleshoot Tribe flows affect each of the various life stages, and thus the entire life cycle, of the various species of salmon?

#### 4. WDOE Unilaterally Imposed the Flows FERC Staff Had Rejected

On April 29, 1993, after almost ten years of extensive efforts by all parties to determine appropriate instream flows for the Project, WDOE short-circuited FERC's entire § 10(j) process. Under the authority of the decision on review here, WDOE simply imposed the fisheries agencies' proposed flow regime as a condition of a § 401 certificate for the White River Project.<sup>24</sup>

As a result, FERC concluded that it had "no authority to establish minimum flows lower than those set forth in the state's certificate" and that further inquiry into the minimum instream flow issue under § 10(j) of the FPA was pointless. 64 FERC ¶ 61,045 at 61,372 (1993).<sup>25</sup> After ten years of work devoted to identifying the issues and investigating the relevant facts, WDOE side-stepped FERC's authority and "resolved" these issues unilaterally by fiat. Puget Power then filed a declaratory action in federal district court challenging WDOE's authority to include minimum streamflows in the water quality certification.

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<sup>24</sup>During the Section 10(j)(2) meeting for the Project, WDOE "identified the Agency flows as its flows." See FERC staff summary of § 10(j) meeting, at p. 5.

<sup>25</sup>FERC rejected Puget Power's request for an evidentiary hearing, reasoning that "no purpose would be served by holding an evidentiary hearing on instream flow issues" because "no party has suggested [under § 10(j)] that higher minimum flows are needed, and the staff's recommended instream flows are lower than those required in the certification." 64 FERC at 61,372. However, in a revised order issued October 12, 1993, FERC amended that order to "reserve the matter for disposition at a later time." 65 FERC ¶ 61,050 (1993).



certification. *Puget Sound Power & Light Co. v. Riveland* (No. C93-5267B; W.D. Wash.). That action has now been stayed pending the resolution of the instant case.

### III. The Importance of FERC's Paramount Authority to the Operation of the Pacific Northwest Coordinated Hydroelectric System

Unless the decision below is reversed by this Court, WDOE's imposition of minimum flow requirements may well cause the loss of all of the hydroelectric power that could have been generated by the Elkhorn project. WDOE's assertion of that same unilateral authority over the White River Project, unreviewable by FERC despite the preliminary conclusions of the 10(j) process, could result in lost power generation from that project of at least \$3.1 million per year and perhaps more, with little, if any, corresponding benefit to the fishery (*see* page 16, *supra*). These losses and costs are not isolated or localized; they will affect users and ratepayers throughout the entire Pacific Northwest region.

At least in the Pacific Northwest, individual hydroelectric projects cannot be considered and evaluated in isolation. Since the early 1960s, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated under the Pacific Northwest Coordination Agreement. This coordination provides substantial benefits to the public in the Pacific Northwest states and in Western Canada. The parties to the Agreement include fifteen public utilities that own and operate hydroelectric facilities in Washington, Oregon,

Idaho, Montana and Wyoming, and also the United States Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over one hundred hydroelectric plants, including twenty-one projects owned and operated by the United States government. The Bonneville Power Administration is a member of the coordinated system; therefore any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.<sup>26</sup> Pursuant to that treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest and, at the same time, to provide for non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and

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<sup>26</sup>Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.



regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The benefits of coordination are equitably distributed through a complex contractual arrangement. Daily adjustment and fine-tuning of the coordinated plan are made necessary by many variables, including especially the weather.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements.<sup>27</sup> The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus the benefits of a large portion of the annual runoff must be captured within a short time or be lost forever. Taking such constraints into account, the coordinated system achieves a delicate balance among utility load requirements, reservoir storage capacity, and streamflow needs.

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<sup>27</sup>For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

The result of this process is a regional system that is coordinated hydraulically, electrically, contractually, and economically. As a consequence, the terms of a single project license in the Pacific Northwest can have interstate and even international effects. To the extent that FERC has the final authority to determine the conditions of hydroelectric licenses, there is a single forum in which such potential long-range effects can be considered and balanced. To the extent that individual states can dictate those conditions on a particular project, the other projects in the system are at the mercy of individual states acting to protect their local interests.

Minimum flow requirements in particular can have a substantial impact on the ability of the system as a whole to optimize power production. They reduce the system's output and flexibility. Minimum flow requirements affect not only the individual project upon

which they are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across interstate and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow requirements on local projects, the economic viability of projects throughout the system could be threatened.

Because the Pacific Northwest hydroelectric system affects many different entities and jurisdictions -- the states and their political subdivisions, the federal government, Canada, and various Indian tribes -- project license proceedings often produce conflict over issues such as flood control, irrigation, recreation, power production, international and Indian treaty rights, and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. FERC's licensing process, governed by the FPA, provides mechanisms for considering and balancing these widely disparate interests.

A central feature of the FPA is Congress's commitment to coordinated study and comprehensive planning along an entire river system. *National Wildlife Federation v. F.E.R.C.*, 801 F.2d 1505, 1507 (9th Cir. 1986). In the Pacific Northwest an "entire river system" often spans several states and may extend into Canada. The FERC licensing process can accommodate and coordinate the many interests involved. To the extent that individual states can dictate the conditions of project licenses, the effectiveness of that process will be damaged.

When the hydroelectric licensing process works as Congress intended, state fish and wildlife agencies play an important role and are assured that they have a strong influence on the outcome. However, FERC retains its paramount authority over that process. It accommodates local fisheries interests as well as the many others that must be taken into account when determining whether a licensed project is "best adapted to a comprehensive plan" for improving or developing the waterway. 16 U.S.C. § 803(a)(1). Two Pacific Northwest projects provide excellent examples of FERC's use of that authority.

#### A. The Wells Dam Example

Wells Dam, operated under FERC License No. 2149,<sup>28</sup> is one of eleven dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam is located in the State of Washington. The dam and its reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and private lands under the jurisdiction of various municipalities and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are other mid-Columbia dams. Further downstream the Columbia River becomes the boundary between Washington and

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<sup>28</sup>Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.



Oregon where it is spanned by several federally-owned projects.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, when necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game (now Wildlife), among others, participated before FERC in developing the details of that requirement.

The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires the Wells Dam licensee to reimburse the Corps if that encroachment should interfere with power production.

The license also prescribes how the dam will be operated, for flood control, in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The many competing interests addressed by the Wells Dam license include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife,

archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries interests of the State of Washington, the license addresses the interests of other states in anadromous fish, tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

#### **B. The Priest Rapids Dam Example**

The history of Priest Rapids Dam provides another example of the importance of FERC's authority.<sup>29</sup> The original Priest Rapids license, issued in 1955, provided for minimum flows which had to be coordinated with releases from a number of upstream dams including two, Grand Coulee and Chief Joseph, which are federally owned. Determination of those original minimum flows had required FERC to balance, in addition to all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford Nuclear Reservation immediately downstream.

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<sup>29</sup>Priest Rapids, Wells Dam, and White River all have storage reservoirs that are operated under the Coordination Agreement. This coordinated reservoir operation is a major component of the Agreement. Under 33 U.S.C. § 1252(b)(6), no license granted by FERC for a hydroelectric power project

... shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion ...

See also 33 U.S.C. § 1252(b)(2). This provision does not apply directly to the Elkhorn Project, which has no storage reservoir.



In 1976, nests of salmon eggs downstream from Priest Rapids Dam were harmed during fluctuating flows. The affected state fisheries petitioned FERC to amend the Priest Rapids license to increase the minimum flows almost twofold. With the help of FERC's Administrative Law Judges, the licensee and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Eventually the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement which established a sliding scale of minimum flows based on how much spawning occurs at various water levels.<sup>30</sup> The ability of Priest Rapids to meet its minimum flow requirements without severe and imprudent reservoir drafts (which would adversely affect power production and recreational facilities), depends on releases from upstream federal storage projects. BPA is a party to this settlement and has agreed to provide releases from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. Two local utility districts also agreed to provide compensated reservoir draft at their upstream projects to assist Priest Rapids.

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<sup>30</sup>Setting minimum flow requirements too high can devastate fish populations. Spawning occurs at the edge of a stream in the shallows. The eggs can be exposed and destroyed if the water level was too high during spawning because of high minimum flow requirements and, for example, was later lowered by drought or other conditions.

The parties involved in this settlement, which was approved by FERC and arrived at under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,<sup>31</sup> the Oregon Department of Fish and Wildlife,<sup>32</sup> BPA, various local utility districts, and three sovereign Indian Tribes (the Yakima, Umatilla and Colville tribes) which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

As these examples show, the system designed by Congress in the FPA works. It works because under that system FERC has ultimate authority over the conditions of hydroelectric licenses. It would not work if each state could, without FERC's consent, unilaterally impose minimum flow requirements on projects within its borders to protect any of the many water-related matters in which the states may be interested from time to time. Such a regime would encourage parochial rather than system-wide planning and decision-making. It would leave other states and other project owners, including the federal government, without a forum authorized and directed to insure that their interests are given appropriate consideration and that decisions are ultimately based on a balanced, comprehensive consideration of various power and non-power interests. This would create an

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<sup>31</sup>Salmon and steelhead may be caught in the Pacific Ocean where they mature before returning upriver to spawn.

<sup>32</sup>Many of these fish are spawned and caught on the Oregon side of the Columbia River.

unworkable system of dual authority over questions of instream flow that was never intended by Congress and which Congress specifically refused to authorize in the FPA.

### CONCLUSION

For the reasons discussed above and in the other briefs filed on behalf of the petitioners, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

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## ATTACHMENT A

### THE PACIFIC NORTHWEST UTILITIES JOINING IN THIS BRIEF AS AMICI CURIAE

#### I. PacifiCorp

PacifiCorp, dba Pacific Power & Light Company and Utah Power & Light Company, is an investor-owned electric power utility based in Portland, Oregon, and Salt Lake City, Utah. PacifiCorp supplies power to a variety of residential, commercial, and industrial customers. Its service areas cover parts of seven western states and include several million people.

PacifiCorp owns and operates 54 hydroelectric facilities in seven states, including seven facilities in Washington. These facilities have a combined nominal generating capacity of slightly more than 1,000 megawatts, of which about half is generated by the Washington facilities. Hydroelectric power constitutes approximately 15 percent of PacifiCorp's total generating capacity, the remainder of which consists primarily of coal-fired generating plants. Because of the ability to adjust hydroelectric power generation rapidly, PacifiCorp relies heavily on its hydroelectric facilities to respond to daily, weekly, and seasonal fluctuations in power demand. In addition, PacifiCorp has responded to short-term load fluctuations through capacity purchases from the Bonneville Power Administration (BPA). The bulk of the capacity purchased through BPA is generated by hydroelectric facilities.



Nearly all of PacifiCorp's hydroelectric facilities, and all of its large facilities, are licensed by the Federal Energy Regulatory Commission. Many of these licenses will expire within the next few years and will require state certifications under section 401 of the federal Clean Water Act.

## II. The Public Generating Pool and Its Members

The Public Generating Pool is a group of publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light); the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD; Grant County PUD; the Eugene Water & Electric Board (EWEB); and the Pend Oreille PUD.

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mws. These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the BPA. As signatories to the Pacific Northwest Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

## A. Seattle City Light

Seattle City Light owns four hydroelectric projects which have a total nameplate rating of 1200 Mws annually: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. It also purchases from five other hydroelectric projects, and has a FERC license for its project on the South Fork of the Tolt River, License No. 2459. Seattle City Light's Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle City Light to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

## B. Tacoma City Light

Tacoma City Light has three federally-licensed hydroelectric projects which have a total rating of approximately 700 Mws. It also purchases from other hydroelectric facilities. Its projects involve rivers with high spring runoffs when compared to reservoir storage capacity. In these licenses in particular, FERC has had to balance federal Army Corps of Engineers flood control concerns with State of Washington instream flow

recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mws, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and nonfederally owned dams on the Columbia River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD

Cowlitz County PUD holds the license for the Swift Project No. 2, License No. 2213, on the Lewis River. The project has a rating of 70 Mws and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mws. The Wells license is described at pages 25-27 of this brief.

F. Grant County PUD

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mws, respectively. The history of the Priest Rapids license is described at pages 27-29 of this brief. Grant County PUD also purchases from several small hydroelectric projects.

G. Eugene Water & Electric Board

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mws. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal license No. 2496 at Leaburg Dam, which was done and approved by FERC.

#### H. Pend Oreille PUD

Pend Oreille PUD owns the 64 Mws Box Canyon Project (FERC License No. 2042) on the Pend Oreille River in Washington. It also owns the Sullivan Creek Project (FERC Project No. 2225) which it operates under the Pacific Northwest Coordination Agreement, to provide storage but no generation of its own. Pend Oreille PUD also has capacity purchase rights from Seattle City Light's Boundary Project.

#### III. Puget Sound Power & Light Company

Puget Sound Power & Light Company is the largest investor-owned electric utility in the State of Washington. It serves 1.5 million people within a 4,500 square mile service area.

Puget Power is highly dependent upon hydroelectric power to serve the needs of its more than 670,000 customers. In 1987, 62.5 percent of Puget Power's load was served from hydroelectric resources: 6.7 percent from company-owned hydroelectric facilities, 37.7 percent from purchases under long-term contracts from hydroelectric projects on the mid-Columbia River owned by PUDs, and 18.1 percent from other purchases of hydroelectric. Puget Power currently has two federally-licensed projects, the Baker River and Snoqualmie Falls projects. It also has six hydroelectric license applications pending before FERC. Three of those pending

applications are for new projects (Swift Creek, Noisy Creek, and Thunder Creek), and three propose expansion at existing projects (White River, Snoqualmie Falls and Nooksack Falls).